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No. 00-1249

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,
Petitioners,

v.

CHICAGO PARK DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

An ordinance of the Chicago Park District requires that individuals obtain a permit before engaging in certain activities on Park District property. Those activities include conducting a public assembly involving more than fifty people and using sound amplification equipment, along with many activities that are not ordinarily related to expression. The ordinance specifies grounds on which a permit may be denied, none of which refers to the content of expression.

The questions presented are:

1. Whether the ordinance violates the First Amendment because it does not require the Park District to initiate judicial proceedings when it denies a permit.

2. Whether the ordinance violates the First Amendment because it does not provide that judicial review of a permit denial must be completed within a specified time.

3. Whether the specified grounds for denying a permit give the Park District excessive discretion, in violation of the First Amendment.

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BRIEF FOR THE RESPONDENT

STATEMENT

1. The Chicago Park District, a municipal corporation established by the state of Illinois, owns more than 7300 acres of parkland in the City of Chicago, including 552 parks, 33 beaches, nine museums, two world-class conservatories, and ten bird and wildlife gardens. See 70 ILCS 1505/1 *et seq.*; City of Chicago Fact Book 65. Chicago's lakefront parks, the most intensively used part of the system, include 2990 acres and 24 miles of shoreline. They were the product of a plan first conceived by Daniel Burnham in 1886, then formally incorporated in his 1909 Plan for Chicago. See II Charles Moore, Daniel H. Burnham: Architect, Planner of Cities 97-115 (1921); Thomas S. Hines, Burnham of Chicago 331-45 (1974). Chicago is notable, among American cities, for "intensively managing and using virtually every inch of

[park]land, unlike most other cities that have large tracts of undeveloped properties[.]" Peter Harnik, Inside City Parks 25 (Urban Land Institute 2000).

Each year, millions of people use Park District property, both for informal recreation and for programmed events, such as day camps, sports leagues, and band concerts. In addition, thousands of special events take place on Park District property annually. See R. 123.[1] Ordinances adopted by the Park District regulate the use of the parks. The ordinances, for example, prohibit the possession of alcoholic beverages on Park District property and regulate such activities as bringing vehicles or animals into the parks and starting fires in the parks. See, *e.g.*, Park Dist. Code, Ch. VII, § B. 5. e.; *id.*, § B. 6.; *id.*, § B. 7; see J.A. 111-13.[2] Other ordinances specify that any person wishing to engage in certain activities on Park District property must obtain a permit before doing so. For example, no person may, without a permit, erect any structure, conduct a sporting event, or offer goods for sale on Park District property. Code § C. 3. a. (7), (9), (12); J.A. 134-35. Among the activities for which permits are required are "conducting a public assembly, parade, picnic, or other event involving more than fifty people" (Code § C. 3. a. (3)) and "creat[ing] or emit[ting] any Amplified Sound" (*id.*, § C. 3. a. (6)). See J.A. 134. A person who violates the Code, or the terms of a permit, is subject to a $500 civil penalty. Code § B. 18; *id.*, § C. 7; J.A. 129, 150.

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[1] "R." refers to the record filed in the court of appeals.

[2] Pertinent provisions of the Park District Code are reproduced at J.A. 103-150. We will cite provisions of Chapter VII of the Park District Code as "Code § __."

In their brief, petitioners cite to an older version of the Code that appears as an appendix to the complaint, at J.A. 59-76. That version of the Code is not in issue in the case; it has been superseded by the version that appears at J.A. 103-150.

Each year, the Park District receives thousands of applications for permits. See R. 62; Pet. App. 7a. The lakefront region of the Park District employs three full-time, year-round employees, plus two summer interns, to coordinate and process special event permit applications. R. 123. Between January 1 and August 1 of this year, the Park District granted more than 1,000 permits for events in the lakefront parks.[3] These permits were for a variety of activities, including professional sports events, week-long festivals attracting tens of thousands of visitors, concerts by nationally-known and local music groups, softball and soccer games, charity benefit walks, private parties, weddings, picnics, and family reunions, as well as political demonstrations.

2. The Park District Code provides that the Park District must grant or deny an application for a permit within fourteen days, unless it extends the period by an additional fourteen days by written notice to the applicant. Code § C. 5. c, d; J.A. 144. Any application not acted on by the deadline is deemed to be granted, conditional upon any of the requirements (such as the payment of a security deposit) being satisfied. Code § C. 5. b; J.A. 144. An applicant who is denied a permit has the right to an administrative appeal to the General Superintendent of the Park District, who must act on the appeal within seven days. Code § C. 6; J.A. 147-48. The applicant may create a written administrative record by submitting "any * * * papers material to the determination" to the Superintendent. Code § C. 6. b; J.A. 148-49.

A Park District ordinance requires that any denial of a permit application be made in writing. The notice of denial "shall clearly set forth the grounds upon which the permit was

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[3] We have lodged with the Clerk, and sent to opposing counsel, a copy of Park District records showing the details of these permits. See Brief for the Respondent Lodging Material.

denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit." Code § C. 5. e; J.A. 145. Chapter VII, Section C. 5. e. of the Park District Code specifies, in detail, the grounds on which permits may be denied. See Appendix, *infra*.[4]

3. In August of 1996, Robert MacDonald, petitioners' predecessor, applied to the Park District for permits to conduct two festivals, the "Festival of Life" and the "Yippie! Festival of Life," in Grant Park. See J.A. 81. The Park District granted both permits. Two weeks after the festivals, the Park District sent MacDonald a letter notifying him that it would withhold his security deposit because it had incurred additional expenses in connection with cleaning up after his events. Pet. App. 18a. The letter also noted that multiple violations of the permits' terms occurred at the events, including such things as "alcohol consumption; unpermitted vendors; unpermitted vehicles; unpermitted tents and canopies; improper location of the generator, in violation of the fire code; and loitering by individuals who remained in the park past 11:00 p.m." *Ibid.*

On March 4, 1997, MacDonald applied for a permit to hold an event in May of that year. J.A. 77-78. Eight days later, the Park District denied the application. *Id.* at 81-83. The Park District's letter explaining the denial cited, among other things, the multiple violations of the August 1996 permits. *Ibid.* MacDonald appealed the denial to the General Superintendent. *Id.* at 84-88, 96-101. The General Superintendent denied the appeal, with an explanation of his reasons. *Id.* at 89-95, 102.

[4] This provision appears at J.A. 145-47, but for convenience we have also reproduced it as an Appendix to this brief. The Joint Appendix misnumbers this provision as § C. 5. d. (The two provisions that appear before it, on J.A. 144, are also misnumbered).

MacDonald then brought suit against the Park District in the United States District Court for the Northern District of Illinois. MacDonald sought both an injunction allowing him to hold the event in May and an injunction prohibiting the Park District from enforcing its permitting ordinance on the ground that the ordinance was unconstitutional on its face and as applied to him. See J.A. 47-57.

The district court denied MacDonald's request for a preliminary injunction requiring the Park District to grant the permit for the May event. R. 16. MacDonald held the event nonetheless. Approximately 5,000 people attended. 7/21/97 Tr. 10; R. 62.[5] The Park District did not attempt to stop the event and in fact cooperated with MacDonald by supplying garbage cans and opening bathrooms for participants. Pet. App. 20a-21a.

MacDonald continued in his effort to have the ordinance declared unconstitutional. The district court initially granted in part, and denied in part, a second motion for a preliminary injunction against the enforcement of the ordinance. *MacDonald v. Chicago Park District*, 976 F. Supp. 1125 (N.D. Ill. 1997). The United States Court of Appeals for the Seventh Circuit vacated the preliminary injunction. *MacDonald v. Chicago Park District*, 132 F. 3d 355 (7th Cir. 1997). During this time, MacDonald sought and received a permit to hold an event in August 1998. Pet. App. 21a n. 8. The Park District denied a permit for another event for reasons having to do with, among other things, the unsuitability of the area in which MacDonald sought to hold the event. MacDonald did not seek administrative review of the denial. *Id.* at 22a.

On remand from the Seventh Circuit's decision, the district court—now confronting only a claim that the ordinance was

[5] "7/21/97 Tr." refers to the transcript of the hearing held on that date.

unconstitutional on its face [6]—granted summary judgment in favor of the Park District. Pet. App. 75a-90a. The district court rejected MacDonald's claim that various provisions of the ordinance gave the Park District excessive discretion to deny a permit. The court ruled that the standards specified in the ordinance were "specific and objective criteria for evaluating permit applications." *Id.* at 84a.

In June, 1999, after the district court decision, MacDonald died, and the current petitioners were substituted as appellants. We note that the Park District has granted petitioners' applications for permits to hold festivals on at least three occasions during this year, on May 19, July 28, and October 13. See Lodging Material, cited at page 3, note 3 *supra*, at 9, 42, 68.

4. The Seventh Circuit affirmed the district court's decision. Pet. App. 1a-12a. The court, noting that petitioners had insisted that the Park District ordinance be classified as a prior restraint, remarked that "the heterogeneity of the practices that the 'prior restraint' formula covers" made that rubric "not * * * a helpful formula." *Id.* at 3a. In particular, the court of appeals explained, the Park District ordinance was different from other "prior restraints" because the ordinance "does not authorize any judgment about the content of any speeches or other expressive activities—their dangerousness, offensiveness, immorality, and so forth." *Ibid.* The court added that "[i]t is not even clear that the regulation

[6] After the preliminary injunction was vacated, the Magistrate issued a report recommending that the Park District be granted summary judgment on the "as applied" challenge. C.A. App. A30; R. 100-101. ("C.A. App." refers to the appendix filed with the court of appeals.) MacDonald did not file objections to the recommendation that summary judgment be granted against him on the "as applied" challenge, and the district court adopted the recommendation. C.A. App. A60. MacDonald did not appeal. Petitioners agree with us that the "as applied" challenge is not before this Court. See Pet. Br. 2 ("This is a facial challenge to [the Park District] ordinance.").

reduces the amount of speech. A park is a limited space, and to allow unregulated access to all co[m]ers could easily reduce rather than enlarge the parks' utility as a forum for speech." *Ibid.* For that reason, the court concluded, "a permit requirement is a sine qua non of managing a park system in a way that will preserve the value of the parks for the general public." *Id.* at 4a.

Against this background, the court of appeals turned to the question whether the ordinance conferred unconstitutionally broad discretion on the Park District. The court noted the danger that such a claim could "invite[] semantic nit-picking and judicial usurpation of the legislative drafting function." Pet. App 5a. The court rejected as "frivolous" petitioners' claim that the ordinance gave the Park District too much discretion because the terms "material" and "misrepresentation," in the provision of the ordinance allowing a permit to be denied because of material misrepresentations in connection with prior permits, were vague. *Ibid.* The court said that petitioners' arguments merely "show[ed] * * * the limits of language and so the inherent limitations of 'facial' challenges." *Ibid.*

The court of appeals then rejected petitioners' claims that the First Amendment forbade the Park District from forgiving some violations of permit conditions and from waiving requirements of insurance and a security deposit. Pet. App. 6a-7a. The court also ruled that "since thousands of permit applications are filed with the park district each year," the Park District's deadlines for administrative action were reasonable. *Id.* at 7a.

Finally, the court of appeals rejected petitioners' argument that the Park District's permit requirement violated the First Amendment because it did not contain adequate provision for judicial review. The court noted that individuals whose permit applications are denied may resort either to state court, which

can review a Park District decision by issuing a common law writ of certiorari, or to federal court, by virtue of 42 U.S.C. 1983. Pet. App. 8a-11a. The court of appeals rejected petitioners' argument that *Freedman v. Maryland*, 380 U.S. 51 (1965), required the Park District to initiate judicial proceedings whenever it denied a permit; *Freedman*, the court of appeals explained, "holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems." Pet. App. 9a.

The court of appeals also declined to require that a deadline be imposed on judicial proceedings reviewing a permit denial. The court noted that such a deadline could "both disrupt the orderly management of a judicial docket and conduce to hasty decision making." Pet. App. 11a. The court of appeals concluded (*id.* at 12a): "Especially in the absence of any showing, which has not been attempted, that the Chicago Park District is trying to restrict the expression of unpopular ideas or that the state courts are not acting with reasonable promptitude on appeals from permit denials, a more relaxed attitude toward the pace of judicial review is warranted than in the case of regulation targeted at unpopular expression."

SUMMARY OF ARGUMENT

The Park District's permit ordinance is part of a comprehensive effort to manage an intensely used system of urban parks. The ordinance is in no way concerned with the content of expression, and indeed only incidentally affects expression at all. Procedural requirements that this Court designed for content-based censorship schemes are, therefore, wholly inappropriate for the Park District's ordinance. Moreover, as a practical matter, it would be completely unworkable to attempt to apply those requirements in this context.

I. The First Amendment does not require the Park District to initiate litigation when it denies an application for a permit. This conclusion follows *a fortiori* from *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), where the Court ruled that a local government agency responsible for licensing sexually-oriented businesses was not required to initiate litigation to defend its denial of a license. In addition, a requirement that the Park District initiate litigation whenever it denies a permit would be utterly unworkable. The Park District receives thousands of permit applications each year, and many must be denied for wholly uncontroversial reasons—because the requested location is already being used or is in some other way unsuitable, for example. No one's interests would be served by requiring the Park District to bring a lawsuit each time it denies such an application.

II. The First Amendment also does not require that the Park District's ordinance specify a deadline for the judicial resolution of a challenge to a permit denial. Such a deadline makes sense only if, as the Court has required in connection with censorship schemes, the judicial proceedings are initiated by the government and the private party is entitled to remain passive; the deadline then ensures that the government will expedite the litigation. When a private party initiates litigation, that party is free to request emergency relief or expedition. Courts can evaluate such requests in the way they do in all litigation—by considering the facts of the particular case before them.

In addition, since the Park District cannot control whether courts meet a deadline, the practical effect of a judicial deadline would be to require the Park District to issue a permit whenever courts fail to resolve a case on time. The Park District could then be compelled to issue permits for conflicting uses of the same area of the parks, or for uses that threaten the infrastructure of the parks, or for obviously

inappropriate uses of the parks. The First Amendment does not require such irrational results.

III. The standards specified in the ordinance more than adequately confine the Park District's discretion. Indeed, the Park District ordinance confers much less discretion than other permit regulations that this Court has upheld.

Petitioners assert that the ordinance is unconstitutional because it allows the Park District to grant a permit even when one of the standards has not been met. But to deprive the Park District of that form of discretion, analogous to the familiar discretion of executive agencies to decline to initiate enforcement proceedings, not only would be impractical; it would greatly disserve First Amendment values by, among other things, requiring the Park District to deny permits to every individual whose permit application is in some way technically deficient.

In any event, because the Park District ordinance predominantly regulates nonexpressive conduct—unlike, for example, statutes or ordinances that require permits for parading or leafletting on public streets—the requirement that administrative discretion be limited by specific standards should not apply in this case

ARGUMENT

Introduction

The Park District ordinance that petitioners attack, as unconstitutional on its face, is part of a comprehensive effort to manage a complex and intensively used system of urban parks—an exceptionally valuable but potentially fragile resource for people who live in the Chicago metropolitan area and for visitors from around the world. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289-90 (1984). The Park District regulates activities that pose a threat to the integrity of the parks, and to the ability of people to use

and enjoy the parks. Most of the regulated activities, by far, have little or nothing to do with expression. The activities for which petitioners sought permits—gathering in groups larger than fifty people, and amplifying sound—are regulated not because they involve expression (they do not, in fact, always involve expression) but because, if left unregulated, they would interfere with other individuals' use and enjoyment of the parks.

Petitioners' attack on the Park District's ordinance rests on a comparison of that ordinance to regulatory regimes like that found unconstitutional in *Freedman v. Maryland*, *supra*. See, *e.g.*, Pet. Br. 2, 12-13, 30-40. This comparison is, however, utterly wrongheaded. *Freedman* involved what the Court described as a "Maryland motion picture censorship statute" (380 U.S. at 52) that prohibited the exhibition of films unless they were licensed by the Maryland State Board of Censors. *Id.* at 52 n.1. See also *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743, 745 (2001). The Court ruled that this censorship scheme was constitutional only if Maryland provided certain procedural safeguards—procedural requirements that, according to petitioners, should be imposed on the Park District as well.

But the predicate of the Court's decision in *Freedman* was that "[t]he administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech." 380 U.S. at 57. The safeguards that the Court required were expressly "designed to obviate the dangers of a censorship system." *Id.* at 58. As the Court has repeatedly said, a ""licensing standard which gives an official authority to censor the content of speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 767 (1988), quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring); *Poulos v. New Hampshire*, 345 U.S. 395, 403 n. 9 (1953).

"Obviously the license required" by the Park District "is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved." *Poulos*, 345 U.S. at 403. As the Court explained in *Cox v. New Hampshire*, 312 U.S. 569 (1941), regulations of this kind are often what make possible the exercise of First Amendment freedoms. "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public [property] has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Id.* at 574. Needless to say, petitioners, or any other group seeking to speak or demonstrate, may challenge, in state or federal court, any decision of the Park District on the ground that it is motivated by hostility to the view they are expressing. But petitioners' effort to apply to the Park District the procedural requirements that were designed for censorship schemes reflects a gross misapprehension of what is at stake.

Petitioners make three specific contentions. See Pet. Br. 12. First, they assert that, under this Court's decision in *Freedman v. Maryland*, the Park District is obligated to institute judicial proceedings, in order to sustain its own action, whenever it denies a permit. See Pet. Br. 33-40. Second, petitioners assert, again relying on *Freedman*, that the Park District ordinance is unconstitutional on its face because it does not specify a deadline by which a court reviewing the denial of a permit must act. See Pet. Br. 30-33. Third, petitioners claim that, under the ordinance, the Park District has "unbridled discretion" to deny a permit. See Pet. Br. 26-29, 40-44. As we demonstrate below, each of these claims is mistaken.

In addition to making these specific claims, petitioners insist that the Park District ordinance should be labeled a "prior restraint." See Pet. Br. 15-24. But in its foundational cases in this area, the Court avoided the term "prior restraint" in discussing content-neutral permit schemes designed "to assure the safety and convenience of the people in the use of" public property. *Cox*, 312 U.S. at 574; see *id.* at 578 ("The statute * * * is not aimed at any restraint of freedom of speech"); *Poulos*, 345 U.S. at 403. Rather, the Court explicitly treated content-neutral permit schemes as regulations of "time, place and manner." *Cox*, 312 U.S. at 576.[7]

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[7] Notably, the opinion of the Court in *Cox v. New Hampshire* was written by Chief Justice Hughes, the author of the Court's earlier opinion in *Near v. Minnesota*, 283 U.S. 697 (1931). *Near* was "the Supreme Court's first great encounter with prior restraint, and [is] * * * th[at] doctrine's leading precedent." John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L. J. 409, 414 (1983). Chief Justice Hughes's description of the permit statute in *Cox* as a "time, place, and manner" regulation that was not "a[] restraint of freedom of speech" (312 U.S. at 576, 578) reflected his, and the Court's, understanding that such a statute is entirely different from a true prior restraint, such as the content-based injunction declared unconstitutional in *Near*. See 283 U.S. at 713-20.

The Court has, on occasion, said that permit requirements constituted "prior restraints." See, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). But invariably the Court has said this only in discussing permitting schemes that provided "no articulated standards" (*id.* at 133) and left the decision whether to issue a permit to the administrators' "unbridled discretion" (*ibid.*). Thus these cases are best understood as standing for the proposition that, when the government is regulating expression, "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a[n unconstitutional] prior restraint" (*City of Lakewood*, 486 U.S. at 757). As we demonstrate below, the Park District ordinance plainly does not confer "unbridled discretion." See Part III, *infra*. Indeed, the Park District ordinance is not even directed at expression. See pages 36-39, *infra*.

Similarly, the Court has explicitly stated that it will not apply "prior restraint analysis" even to an injunction directed at particular speakers, if the injunction is not based on "the content of * * * expression" but instead only "incidentally affect[s] expression" and leaves the speakers opportunities to express their views at other times and places. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994); see also *Schenck v. Pro-Choice Network*, 519 U.S. 357, 374 n.6 (1997); *Hill v. Colorado*, 530 U.S. 703, 734 (2000) ("[O]ur concerns about 'prior restraints' relate to restrictions imposed by official censorship."). A decision by the Park District to deny a permit has all of these characteristics: it is not based on the content of the expression; it only incidentally affects expression, since the Park District's concern is not with the expressive character of any activity but rather with the impact of the activity on the parks; and a permit denial leaves the applicant free to speak in other places and at other times. It follows that the Park District ordinance is also not a "prior restraint."

In any event, the court of appeals was surely correct in its observation that petitioners' rhetorical claim that the Park District ordinance is a "prior restraint" does not advance the analysis of the issues in this case. Those issues—specifically, what procedures the First Amendment mandates for regulations like the Park District's—can be answered only by analyzing the nature of those regulations, not simply by insisting that the label of "prior restraint" applies to them.

I. THE FIRST AMENDMENT DOES NOT REQUIRE THE PARK DISTRICT TO INITIATE JUDICIAL PROCEEDINGS WHEN IT DENIES A PERMIT.

In *Freedman v. Maryland, supra*, this Court held that a state motion picture censorship scheme was constitutional only if the state provided certain procedural safeguards. As

elaborated in subsequent cases, *Freedman* requires, first, that there be "limits on the time within which the decisionmaker must issue the license" (*FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion), citing *Freedman*, 380 U.S. at 59); second, that a government agency responsible for censoring speech must, if it does not license speech, "go to court to restrain [the speech]" and "[bear] the burden of proving that the [speech] is unprotected expression" (*Freedman*, 380 U.S. at 59, 58; *see FW/PBS*, 493 U.S. at 228, 230); and third, that the censorship and licensing scheme "must also assure a prompt final judicial decision" (*Freedman*, 380 U.S. at 59).

There is no issue in this case about the first of the *Freedman* requirements, that the license be granted or denied "within a specified brief period" (*Freedman*, 380 U.S. at 59).[8] See Pet. Br. 2 (invoking only the other *Freedman*

[8] The Park District ordinance specifies deadlines by which an administrative determination must be made: a permit application must be acted on within fourteen days (with a maximum possible extension of an additional fourteen days) or it will be deemed granted. Even if an application is incomplete at that point, it will, under the Park District ordinance, be deemed granted, conditional on completion. If a disappointed applicant seeks administrative review, that review must be concluded within seven days. As the court of appeals ruled, these deadlines are plainly reasonable, given the enormous volume of permit applications that the Park District must consider.

In addition, the uncontradicted evidence in the record is that the Park District responds to applications as quickly as it can. See 7/21/97 Tr. 34-35; R.62. The Park District accommodates requests on as little as one day's notice if the event does not require more planning or coordination with other departments. See R.123, ¶ 34; 7/21/97 Tr. 35; R.62. The Park District also has a policy of allowing "spontaneous" demonstrations (see Pet. App. 7a), and, as the Seventh Circuit noted in earlier proceedings in this case, "there is nothing in the record to indicate that the Park District has ever intervened to stop a First Amendment rally in one of its parks due to the absence of a permit." *MacDonald v. Chicago Park District*, 132 F.3d 355, 358 (7th Cir. 1997).

requirements). Petitioners do claim, however, that the Park District's ordinance is unconstitutional because it does not conform to the second *Freedman* requirement—that the government, rather than the applicant, be responsible for initiating judicial proceedings when a permit is denied (and, related, that the government bear the burden of proof in such an instance). See Pet. Br. 33-40. This contention is foreclosed by the Court's decision in *FW/PBS*, *supra*. But beyond that, this requirement, in the context of a regulatory scheme like the Park District's, is utterly unworkable.

A. *FW/PBS v. City of Dallas* Establishes That The Park District Is Not Required To Initiate Proceedings Reviewing A Permit Denial.

1. In *FW/PBS*, the Court considered a challenge to a Dallas, Texas, ordinance that required licenses for "sexually oriented businesses" (493 U.S. at 220 (plurality opinion))—that is, principally "businesses purveying sexually explicit speech" (*id.* at 224). Although there was no opinion of the Court, a majority of the Court concluded that the Dallas ordinance was unconstitutional because it failed to specify a deadline for action by the licensing authority. *Id.* at 226-27; see *id.* at 238 (Brennan, J., concurring in the judgment). But a majority of the Court also explicitly rejected the argument that the Dallas ordinance was unconstitutional because it did not require the licensing agency to initiate judicial proceedings when it denied a license: "[W]e conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *Id.* at 230 (plurality opinion); see *id.* at 244-48 (White, J., concurring in part and dissenting in part); *id.* at 250 (Scalia, J., concurring in part and dissenting in part).

The basis of the Court's holding in *FW/PBS* applies directly—indeed, *a fortiori*—to the Park District ordinance.

As the *FW/PBS* plurality explained, the Dallas "licensing scheme * * * is significantly different from the censorship scheme examined in *Freedman*" because "[i]n *Freedman*, the censor engaged in direct censorship of particular expressive material" and "such regulation of speech is presumptively invalid * * *". 493 U.S. at 229. By contrast, "[u]nder the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech." *Ibid.* Under the Park District ordinance, too, no government official passes judgment on the content of any expressive material.

In fact, the Park District ordinance presents much less of a danger to First Amendment values than even a licensing scheme like Dallas's. In *FW/PBS*, the licensing requirement, while applicable to some firms that did not engage in expressive activities, "largely target[ed] businesses purveying sexually explicit speech" (493 U.S. at 224 (plurality opinion)). The Park District ordinance does not in any sense target expressive activities. It targets activities that will affect the use of the parks. Most of those activities are unlikely to be expressive; only a few will, incidentally, be expressive in nature.

Further, the Dallas ordinance did not just target expressive activity; it targeted businesses engaging in expression with a certain content. The Dallas ordinance reflected a judgment, by a legislative body, that "sexually explicit" speech presented certain dangers and therefore had to be regulated. When a legislative body makes such a judgment, there is some reason for concern that the executive agency charged with implementing the judgment will be hostile to speech with the proscribed content. *Cf. Freedman*, 380 U.S. at 57 ("[T]he censor's business is to censor"). The Park District's regulatory regime does not rest on any remotely similar judgment about speech—not speech in general, and certainly not speech with a certain content. The Dallas ordinance was

far removed from the Maryland censorship scheme invalidated in *Freedman*, as the Court ruled in *FW/PBS*. The Park District's ordinance is much further removed still.

2. Petitioners attempt to distinguish *FW/PBS* on two grounds. First, petitioners say, *FW/PBS* involved sexually explicit speech that is, according to petitioners, of lower value than the political speech in which they engage. See Pet. Br. 36. But nothing in the reasoning of the majority in *FW/PBS* suggests that that decision rested on an assessment of the value of the speech involved. The Court assumed that the speech at stake was fully protected. See 493 U.S. at 224 (plurality opinion); *id.* at 245 (opinion of White, J.).[9]

Second, petitioners argue that they should not be required to institute judicial proceedings seeking review of a permit denial because they, unlike a movie exhibitor or a sexually-oriented business, do not stand to gain financially from obtaining a permit. See Pet. Br. 35, 39; see also *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F. 3d 761, 775-76 (11th Cir. 2000), petition for cert. filed, No. 00-1503. This argument rests on a misunderstanding of the basis of the *Freedman* requirements. The Court in *Freedman* was not addressing the general situation of parties who will not gain financially if their constitutional claims are vindicated—a situation that arises frequently, across the whole range of constitutional issues, not just in connection with censorship statutes.

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[9] Justice Scalia's opinion came closest to viewing the speech in question as lower value; he reasoned that businesses engaged predominantly in the sale of sexually-oriented material could be held to be engaged in the constitutionally unprotected activity of pandering, under *Ginzburg v. United States*, 383 U.S. 463 (1966). See 493 U.S. at 256-58 (Scalia, J., concurring in part and dissenting in part). No other Justice joined his opinion, however.

Rather, as its opinion makes clear, the *Freedman* Court was concerned with the particular circumstances of the motion picture industry at a time when that industry was subject to censorship laws in "only four States and a handful of municipalities" (380 U.S. at 59). In such circumstances, the Court explained, it was entirely possible that a local board's censorship of a film would not be challenged by either the exhibitor (who could show other films, approved by the censor) or the distributor (who could "freely exhibit his film in most of the rest of the country" (*ibid.*)). The real victims of unconstitutional censorship by a local censorship board would then be potential viewers who were denied an opportunity to see the censored film, and they would often have no realistic opportunity to challenge the Board of Censors' decision.

No comparable problem exists when permit applicants are denied a permit to conduct an event in the parks. Unlike potential viewers of a censored film, a disappointed permit applicant is immediately aware of the government's action and has a clear opportunity to challenge that action in court. Moreover, permit applicants like petitioners have the most direct interest in overturning the government's action; they are not in the position of relying on some other party to vindicate their rights. Thus the logic of *Freedman* is again simply inapplicable to a permitting regulation like the Park District's.

Petitioners treat *Freedman* as if it stands for the principle that the government must carry the burden of initiating litigation, and proving the absence of a constitutional violation, whenever a private party does not stand to gain financially from doing so. But that far-reaching principle has never been accepted as a matter of constitutional law. Many litigants claiming a deprivation of constitutional rights—not just those challenging a permit denial on First Amendment grounds—do not stand to gain financially if they succeed. Litigants raising claims under the Free Exercise Clause, the

Due Process Clause, the Equal Protection Clause, the Eighth Amendment, or a host of other constitutional provisions routinely do not stand to gain financially. There is a straightforward way to deal with this situation, and Congress has prescribed it, by authorizing the award of attorney's fees to prevailing parties in certain categories of litigation. See, *e.g.*, 42 U.S.C. 1988. Adopting a special procedural rule for First Amendment challenges to permit denials, as petitioners suggest, is not an appropriate response to this situation.

B. Requiring The Park District To Initiate Litigation Would Be Wholly Impractical.

Even apart from the Court's decision in *FW/PBS*, a requirement that the Park District initiate litigation to defend a permit denial would be utterly unworkable. The Park District considers thousands of permit applications each year. Often, because of the intense use of the parks, there will be conflicting requests for the same space. In such instances, the Park District must deny the application (although, in accordance with the specific dictates of its ordinance, the Park District offers the applicant an alternative time or place for its event (see Code § C. 5. d; J.A. 145)).

If petitioners' approach were to prevail, the Park District would have to file suit whenever it is unable to issue the requested permit, no matter how reasonable the grounds for its denial. This would impose an enormous burden on the Park District and on the courts—and, for that matter, an unwanted burden on permit applicants, many of whom presumably do not want to be named as defendants in litigation just because they sought a permit to hold an event in the parks.

The record of this case alone provides several examples of routine and reasonable permit denials that, under petitioners' approach, would require the Park District to initiate litigation. (The contrast with a censorship scheme—in which a denial of

permission can never be characterized as routine and is presumptively unreasonable (see, *e.g.*, *Freedman*, 380 U.S. at 57)—is again apparent.) On one occasion, MacDonald, petitioners' predecessor, sought to use sound amplifying equipment in Grant Park at a time when a band concert was scheduled nearby. 7/18/97 Fencik Dep. 24-26.[10] On another occasion, he applied to use a portion of Lincoln Park that, apparently unknown to him, had been converted into soccer fields. *Id.* at 16. And on another occasion, the irrigation system under a field that MacDonald had previously used for an event had been repaired, and large crowds would turn the grass into mud. *Id.* at 57-58. If petitioners were to prevail, the Park District would be required to bring suit whenever it denied a permit for reasons like these.

Not only would it be unworkable to impose such a requirement on the Park District; it would also serve no purpose, since, of course, the state and federal courts will entertain a claim by any applicant who believes that the Park District has acted wrongly, as we explain in more detail below. Permit applicants who believe they have been treated wrongly by the Park District would, therefore, gain little benefit from a requirement that the Park District initiate litigation against them. At the same time, the costs to the Park District and the courts would be substantial, perhaps crushing. The First Amendment does not require such a perverse result.

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[10] "7/18/97 Fencik Dep." refers to the deposition of Joan Fencik, General Counsel of the Chicago Park District.

II. THE FIRST AMENDMENT DOES NOT REQUIRE THAT A DEADLINE BE SPECIFIED IN ADVANCE FOR THE JUDICIAL RESOLUTION OF PROCEEDINGS CONTESTING THE DENIAL OF A PERMIT.

Under *Freedman*, a censorship "procedure must * * * assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." 380 U.S. at 59. Petitioners assert (Pet. Br. 30-33) that this requirement applies to the Park District's ordinance. This contention, too, misapprehends the meaning of *Freedman*.

A requirement that a regulatory regime specify a deadline for a judicial decision makes sense only when there is an independent requirement that the government initiate litigation to defend the denial of a license. The purpose of a deadline for judicial action is to ensure that the government, as plaintiff, will expedite the litigation. When the litigation is initiated by the permit applicant, the applicant is able to seek whatever expedition is needed—by means of an application for a temporary restraining order or a preliminary injunction, or by seeking another appropriate form of emergency relief. A hard-and-fast deadline for judicial action, specified in advance, is needed only when the government is in control of the litigation, and the speaker is entitled to remain passive. Since—as we have demonstrated—there is no requirement that the Park District initiate litigation to defend its permit denials, there should also be no requirement that a judicial deadline be specified in advance.

In addition, because the Park District's regulatory scheme is fundamentally different from a censorship regime like that involved in *Freedman*, a fixed deadline for judicial action is, again, wholly impractical. If a deadline were not met—and the Park District has no way to compel a court to meet the

deadline—the Park District would, under petitioners' approach, be required to issue a permit, even if the area of the park in issue were being used for a conflicting purpose, or the infrastructure of the parks would not withstand a particular use, or the permit allowed an obviously inappropriate use of the parks. The possibility of such irrational results shows that the *Freedman* approach is simply not appropriate for a regulatory scheme like the Park District's.

A. A Deadline For Judicial Action Is Appropriate Only When The Government Is Required To Initiate Litigation Seeking Review Of Its Own Decision.

1. The plurality opinion in *FW/PBS*, *supra*, concluded that while the government did not have to initiate litigation to defend a license denial, "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." 493 U.S at 228. See also *id.* at 230 ("[T]he availability of prompt judicial review" is sufficient to satisfy the First Amendment.). Some lower courts, like petitioners, view this language as requiring that a licensing scheme specify a deadline by which judicial proceedings reviewing a license denial must be completed. See, *e.g.*, *Baby Tam & Co. v. City of Las Vegas*, 154 F. 3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd. v. Prince George's County*, 58 F. 3d 988, 999-1000 (4th Cir. 1995) (en banc).

This conclusion conflicts with the plain meaning of the plurality's language. In referring to the "possibility" and "availability" of prompt judicial review, the *FW/PBS* plurality was contemplating only that a plaintiff challenging a license denial would have available to it the familiar means by which a litigant may obtain prompt judicial action—a motion for an injunction pendente lite or some other form of emergency relief. Prompt judicial review is "available" and "possible" whenever a litigant may seek such relief.

Prompt judicial review would unquestionably be "available" to petitioners if they were to challenge the Park District's denial of a permit—as petitioner's predecessor demonstrated, by repeatedly seeking (although unsuccessfully, on the merits) preliminary injunctions. Indeed, petitioners would have a choice of forums, and could choose the one that best suited their purposes. A permit denial may, of course—as in this case—be challenged on constitutional grounds in federal court in a suit under 42 U.S.C. 1983. A plaintiff in federal court may seek a temporary restraining order and a preliminary injunction. Fed. R. Civ. P. 65. If a motion for preliminary injunction is denied, the plaintiff has an immediate appeal to the court of appeals. 28 U.S.C. 1292 (a)(1).

Alternatively, a party whose application for a permit is denied by the Park District may proceed in Illinois state court. Such a party can seek review by means of the common law writ of certiorari, which allows a trial court to review the administrative record and set aside any administrative decision that is not supported by substantial evidence or is arbitrary or capricious. See, *e.g.*, *Hanrahan v. Williams*, 174 Ill. 2d 268, 272-73, 673 N.E.2d 251, 253-54 (1996); *Stratton v. Wenona Community Unit Dist. No. 1*, 133 Ill. 2d 413, 427, 551 N.E. 2d 640, 645 (1990); *Holstein v. City of Chicago*, 29 F.3d 1145, 1148 (7th Cir. 1994) (describing common law certiorari as an "expansive remedy" that provides "extremely broad" review of all questions of law and fact, including de novo review of constitutional questions). If a request for declaratory or equitable relief is joined to the petition for a common law writ of certiorari, the plaintiff may introduce evidence not contained in the administrative record. See *Goodfriend v. Board of Appeals of Cook County*, 18 Ill. App. 3d 412, 420-21, 305 N.E.2d 404, 410 (1st Dist. 1973). A disappointed applicant may also bring an action under Section 1983 in state court and may join that claim to the request for a

common law writ of certiorari; this, again, would permit the court to consider evidence outside the administrative record. See, *e.g.*, *Stratton*, 133 Ill. 2d at 428-29, 551 N.E. 2d at 646-47. See also *Stykel v. City of Freeport*, 318 Ill. App. 3d 839, 742 N.E.2d 906 (2d Dist. 2001). In any of these proceedings, the state trial courts, under rules similar to the Federal Rules of Civil Procedure, may grant a temporary restraining order (see 735 ILCS 5/11-101) or a preliminary injunction (see 735 ILCS 5/11-102). See also 735 ILCS 5/11-106 (emergency relief on weekends and holidays).

Petitioners suggest (see, *e.g.*, Pet. Br. 23) that the common law writ of certiorari provides an inadequate means of reviewing permit denials, because the review is conducted on the administrative record. Petitioners are wrong about the adequacy of state procedures: disappointed applicants who want to introduce evidence in state court that is not in the administrative record can do so in the ways we have described, and of course they can also sue in federal court. More fundamentally, however, any inadequacies in state procedures do not entitle petitioners to relief in this case. If the Park District's ordinance is otherwise wholly sound, it should not be declared unconstitutional on its face—the relief petitioners seek—because of supposed deficiencies in the evidentiary rules governing state court proceedings. It would make no sense to say that, because of those supposed evidentiary deficiencies, the Park District is disabled from managing the parks.

The proper remedy for such deficiencies, if they exist, can be provided to a litigant who can show that those deficiencies have prejudiced it. The remedy should not be to grant relief to petitioners, who did not even invoke state court procedures, and who make no complaint about the federal court procedures that they did invoke. In other cases in which the Court has concluded that state procedures were constitutionally inadequate, the relief has been to require state courts

to provide adequate remedies to a party litigating in state courts—not to prevent the operation of a state or local regulatory program. See, *e.g.*, *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Division of ABT*, 496 U.S. 18 (1990); *Ward v. Love County*, 253 U.S. 17 (1920).

2. A requirement that there be a deadline for judicial action, specified in advance, is appropriate only if the government must initiate proceedings to review the denial of a license—something the Board of Censors was required to do in *Freedman* but that the Park District need not do, as we demonstrated above. The judicial deadline is a way of controlling the unusual litigation in which the government is seeking judicial review of its own decision and, as in *Freedman*, the private party affected by the government's decision is entitled to remain passive. The deadline ensures that the Board of Censors, or a comparable government entity, will do everything it can to expedite a case it has initiated. Without a deadline for judicial resolution, the government entity has no incentive to do so.

When a private party sues the government, however, there is no need for a deadline. That party can simply seek expedition in the particular case. If a plaintiff challenging the denial of a permit is unable to obtain prompt judicial relief, that will be because a court has decided, on the particular facts of the case before it, that prompt relief is not appropriate. The judicial deadline that petitioners seek will accomplish nothing except to take away from the courts the decision about whether, and to what degree, the particular litigation before them should be expedited. There is no reason systematically to distrust such decisions in cases reviewing the denial of a permit.

Petitioners' argument to the contrary is based on the mistaken idea that the judicial deadline requirement in *Freedman v. Maryland* is animated by a need to control the

courts. In fact, the judicial deadline requirement, like the other procedural safeguards mandated by *Freedman*, responds to the concern that is manifest in the *Freedman* opinion—a concern that the Board of Censors would be insufficiently solicitous of First Amendment rights. See 380 U.S. at 57-59. Nothing in the *Freedman* opinion suggests that this Court lacked confidence in the ability of the lower courts, including state courts, to adjudicate First Amendment claims. On the contrary, the basis of the *Freedman* approach is precisely that courts, not the Board of Censors, should make the final decision about whether speech will be censored. See *id.* at 58.

Courts are frequently in the position of having to decide whether emergency relief is required. That question can arise under many constitutional provisions, sometimes in cases with extremely high stakes. We routinely trust the courts, state and federal—here, it will be the court chosen by the party seeking relief—to adjudicate such requests in a reliable fashion. Where the applicant, not the government, is in control of the litigation, a hard-and-fast deadline, specified in advance, is a blunderbuss—an unnecessarily crude way of trying to accomplish what is routinely done, even in cases of the greatest importance, through case-by-case determinations by judges familiar with the particular facts and issues at hand.

B. A Fixed Judicial Deadline Would Require The Park District To Issue Permits In Unquestionably Inappropriate Circumstances.

One final aspect of *Freedman*'s judicial deadline requirement makes clear how unsuitable that requirement is for a regulatory scheme like the Park District's. The Park District, of course, cannot issue rules that control the dockets of courts reviewing its actions. Nor can it control whether courts meet a deadline. If there is a deadline for judicial resolution of a challenge to the Park District's action, and the courts fail to meet that deadline, all the Park District can do is issue the requested permit.

Thus the net effect of a judicial deadline is that permits will sometimes be issued even when the Park District has determined not to issue them and no court has overturned the Park District's decision. Under a censorship scheme like *Freedman*'s, such an outcome is not especially troublesome. Censorship schemes are "viewed with suspicion" (380 U.S. at 57), and a decision to censor a film is presumed unconstitutional (see *id.* at 58). The Court in *Freedman* emphasized the need to avoid de facto censorship that is not explicitly approved by a court. See *id.* at 59.

But under a permit regulation like the Park District's, it will often be irrational to grant a permit just because the courts have not acted quickly. The Park District might be in the position of granting permits for two conflicting uses of the same land; or of granting a permit that will cause the infrastructure of the park system to be overtaxed, or that will cause parkland to be used in a way that will detract from other legitimate uses, or that will impose unwarranted financial or logistical burdens on the park system. These outcomes—which, unlike the showing of a censored film, are uncontroversially undesirable and potentially destructive—would be the unavoidable result if a deadline for final judicial decision were missed. The potential irrationality of this result demonstrates that such a deadline, although a plausible way of controlling a censorship scheme, makes no sense when applied to the fundamentally different kind of regulation at issue here.

III. THE ORDINANCE DOES NOT VEST UNCONSTITUTIONALLY BROAD DISCRETION IN THE PARK DISTRICT.

Petitioners also contend that the Park District ordinance violates the First Amendment because it grants the Park District too much discretion over the decision whether to deny a permit. The relevant provision of the ordinance

(reproduced at App., *infra*) enumerates several specific grounds on which a permit may be denied—most of which are simply needed to make the permitting scheme workable. For example, the ordinance provides that an application may be rejected if it is not complete (Code § C. 5. e. (1)), if it contains material misrepresentations (*id.*, § C. 5. e. (3)), or if it seeks permission to engage in a prohibited activity (*id.*, § C. 5. e. (8)) or in an activity that conflicts with other authorized uses of the parks (*id.*, § C. 5. e. (7)). Any permitting scheme will have provisions like these.

A. The Park District Ordinance Allows Far Less Discretion Than Other Permit Regulations That This Court Has Approved.

It is unclear which particular ground for denial, listed in the ordinance, petitioners believe to allow excessive discretion; they assert broadly that "[v]agueness permeates the entire ordinance." Pet. Br. 28. In fact, the most conspicuous feature of the Park District ordinance is that it is much *more* specific than permit regulations that this Court has previously upheld. For example, in *Cox v. New Hampshire, supra*, the Court—upholding a state statute that prohibited any "parade or procession" on public streets without a license—ruled that the statute did not grant excessive discretion because the state supreme court required a license to be issued if "the convenience of the public in the use of the streets would not thereby be unduly disturbed." 312 U.S. at 576. This standard is far more discretionary than any of the standards set forth in the Park District ordinance.

Similarly, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court ruled that an ordinance requiring "the best sound for all events" and requiring that the event organizer "insure appropriate sound quality balanced with respect for nearby residential neighbors" did not give authorities

excessive discretion. *Id.* at 794.[11] None of the standards in the Park District's ordinance is nearly as open-ended. The local ordinance upheld in *Kovacs v. Cooper*, 336 U.S. 77 (1949), forbade "loud and raucous" sound amplification (*id.* at 79 (opinion of Reed, J.)); the Court has cited this standard as an example of a sufficiently specific limit on official discretion (see *Ward*, 491 U.S. at 794). This, too, is significantly more discretionary than anything in the Park District's ordinance.

In the closely related context of First Amendment challenges based on the alleged vagueness of laws prohibiting certain kinds of expression, the Court has upheld an ordinance that prohibited "actual or imminent interference with the 'peace or good order' of [a] school" (*Grayned v. City of Rockford*, 408 U.S. 104, 111-12 (1972)). The Court has also upheld a federal statute that allowed police to order demonstrators to disperse if the police reasonably believed that the demonstrators threatened to disrupt the "security or peace" of a foreign embassy. See *Boos v. Barry*, 485 U.S. 312, 330, 332 (1988). These, too, are less specific than the Park District's requirements.

No standard is self-interpreting; as the court of appeals cautioned, any provision in any permit scheme can be shown to allow some room for discretion. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Accordingly, this Court has made clear that it is permissible for standards to be "flexible" and for "the officials implementing them [to]

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[11] The municipal ordinance at issue in *Ward* did not require a license, but the Court held that the ordinance satisfied the requirement of limited discretion that is applicable to licensing ordinances. See 491 U.S. at 793-94 (concluding that the Court "need not decide" (*id.* at 794) whether the ordinance is subject to the same standards as "licensing schemes" (*id.* at 793) because the challenge to the ordinance would fail "on the merits" (*id.* at 794) even if those standards were applied).

exercise considerable discretion." *Ward*, 491 U.S. at 794. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ibid.* When compared to other standards that have come before the Court, the Park District's requirements are far more than adequately specific.

Petitioners never describe what degree of specificity they would require in a permitting scheme; as the court of appeals pointed out, that leaves them free to attack any standard that allows for the exercise of any judgment whatever, as, of course, every standard will. But this Court has explained the degree of specificity that is needed. In *City of Lakewood v. Plain Dealer Publishing Co., supra*, the Court identified the reasons for requiring clear standards (486 U.S. at 758):

> Standards provide the guideposts that * * * allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

See also *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). As the Court has said in a related context, the issue is whether the criteria that govern administrative action are "drawn so that a court would have [a] meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-13 (1971).

The requirements set out in the Park District's ordinance are plainly specific enough to serve these purposes. They unquestionably give a court a "meaningful standard against which to judge the [Park District's] exercise of discretion."

The ordinance commits the Park District, ahead of time, to a limited list of reasons that can justify the denial of an application. If an application satisfies these straightforward and easily-met criteria—as, of course, thousands of applications do each year—the Park District will be unable to seize upon some other feature of the application and use that as a "*post hoc* rationalization[]" for denying an application. By any measure, therefore, the standards specified in the Park District ordinance meet this Court's requirements.[12]

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[12] *Amici curiae* Morality in Media, *et al.*, seek to raise the question (Br. 6-7) whether the Park District ordinance violates the First Amendment because it specifies that, "[t]o the extent permitted by law," the Park District "may deny an application for a permit if the applicant * * * has violated the terms of prior permits" (Code § C. 5. e; J.A. 145). While we agree with *amici* that the constitutionality of this provision is clear, we believe the question whether it is constitutional is not before the Court. The question whether this provision of the ordinance is too restrictive of speech—a question that would be determined under the standard for non-content-based restrictions set forth in such cases as *Ward v. Rock Against Racism*, 491 U.S. at 791—is not comprised within the questions presented in the petition, was not raised on appeal by petitioners or addressed by the court of appeals, and is not argued in petitioners' brief in this Court.

The Park District relied in part on this provision when it denied a permit to MacDonald. See J.A. 81-83. But MacDonald lost his "as applied" challenge to that permit denial in the district court and did not appeal. See note 6, *supra*. Petitioners are in agreement with us that the only questions before this Court pertain to the "facial" challenge. See Pet. Br. 2. In any event, MacDonald engaged in the demonstration even though he was denied a permit, and the Park District subsequently issued him permits; and petitioners, unlike MacDonald, do not allege that they have had a permit application rejected because of past violations. The resolution of an issue like this—about the reasonableness of a particular permit requirement—should plainly wait for a controversy over a specific permit denial, actual or threatened; it should not depend on hypothetical speculation about the kinds of cases to which this standard might apply. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998), quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) ("[W]e

B. The First Amendment Does Not Require That The Park District Deny All Non-Conforming Permit Applications.

Petitioners also assert that the Park District ordinance is insufficiently specific because it does not require the Park District to deny a permit to every application that fails to comply with the specified standards. Pet. Br. 28-29. This novel contention—that a permitting scheme is unconstitutional on its face unless it gives officials no leeway to forgive a violation of a standard—is wholly implausible. Not only does it ignore the practicalities of any permitting system; petitioners' position would, if accepted, do far more harm than good to First Amendment values.

The ordinance provides that the Park District "may deny" an application for the specified reasons. See Code § C. 5. e.;

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are reluctant * * * to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'").

Although we believe the Court should not reach the question on the merits, the constitutionality of this provision is, in fact, clear. In *United States v. Albertini*, 472 U.S. 675 (1985), for example, the Court upheld the exclusion of a speaker from what the Court assumed was a public forum (see *id.* at 687)—an "open house" at a military base—because the speaker had, nine years earlier, received an order from the commander barring him from the base. Such an order did not require a predicate finding that the person in question had engaged in wrongful conduct. It follows that the Park District may decide not to grant a permit to someone who has engaged in specific wrongful conduct of a kind directly related to the integrity of the permitting scheme. In particular cases, it may be unreasonable—under state administrative law, the Due Process Clause, or possibly the First Amendment—to impose "a bar * * * of indefinite duration" for this reason, but as in *Albertini*, it is surely not "inherently unreasonable" (*id.* at 690) for the Park District to do so, and the question whether it is unreasonable in a particular case—again as in *Albertini*—can only be litigated when presented by specific facts. *Ibid.* See also *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994) (an injunction issued "because of * * * prior unlawful conduct" is not a prior restraint).

App., *infra*, 1a. The Park District thus retains discretion to issue a permit to a non-complying application—a form of discretion comparable to the familiar prosecutorial discretion, or to an administrative agency's discretion not to bring an enforcement action. Needless to say, the First Amendment imposes limits on the Park District's exercise of this discretion; the Park District may not, for example, selectively waive non-compliance by speakers with whom it agrees, while enforcing the standards rigidly against those with whom it disagrees. Any individual who believes that the Park District has engaged in such a practice may challenge a permit denial on that ground, on an "as applied" basis. There is no showing in this case—indeed, as the court of appeals noted, none has even been attempted (Pet. App. 12a)—that the Park District has acted in such an improper fashion.

Rather, petitioners assert that, in order to reduce the likelihood that such selective non-enforcement will occur, a permit regulation is unconstitutional on its face unless it precludes all such discretion. This approach makes no sense. To begin with, even if such a rigid approach could be implemented—as we explain later, we doubt that it can—it would exact a steep price from First Amendment values. Many speakers whom the Park District now allows to speak would, under petitioners' approach, have to be denied a permit because of minor or technical errors in their application papers. This is particularly true of less well-organized applicants, who are especially likely to submit applications that are incomplete or untimely. It is difficult to see how the supposed gain in detecting improper selective enforcement would be great enough to justify the cost, to First Amendment values, of rigidly denying such applicants a permit for technical reasons.

In addition, petitioners' approach will discourage government agencies from adopting highly specific criteria, as the Park District did in this case, and instead give them an

incentive to use the most discretionary standards that the courts will allow. This, too, is a very undesirable effect, so far as the First Amendment is concerned. If, for example, the Park District had adopted the standard that this Court approved in *Cox v. New Hampshire*—whether "the convenience of the public in the use of the streets would * * * be unduly disturbed" (312 U.S. at 576)—it would have ample leeway to forgive minor breaches by permit holders. Any government agency will, quite reasonably, want to allow for the common-sense use of discretion that virtually every regulatory regime requires. Especially when the First Amendment is involved, it is surely better for such an agency to adopt more specific standards, while reserving the traditional discretion to decline enforcement—as the Park District did here—than to adopt more vague standards and exercise that discretion sub rosa.

Finally, as the comparison to prosecutorial discretion suggests, petitioners' approach would require not just the unforgiving enforcement of permit standards but the mandatory prosecution of every violation of a permit ordinance. It would be pointless to require a government agency to deny a permit to every non-conforming application if the agency could decline to prosecute those who proceeded without a valid permit. Indeed it would be worse than pointless, because it would encourage disorder and disregard for the law.

The Court has consistently resisted suggestions, in every context, that the Constitution requires the elimination of administrative discretion to decline to enforce regulatory requirements. On the contrary, the Court has emphasized the importance of maintaining such discretion, even in those areas where the Court is most alert to the risks of discriminatory enforcement. See, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987); *United States v. Armstrong*, 517 U.S. 456,

464-65 (1996). See also *Heckler v. Chaney*, 470 U.S. at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion.") And again, leaving aside the possibility of improper selective enforce-ment, the exercise of such discretion in the case of a permit scheme like the Park District's will *always* favor speech. The Park District has, for example, a policy—of which petitioners' predecessor MacDonald took advantage—of allowing spontaneous demonstrations. See Pet. App. 7a. It would hardly promote free speech to require the authorities to punish people for technically illegal demonstrations even when the authorities have concluded that those demonstrations do no harm.

C. Because The Park District Ordinance Is Not Directed At Expression, The Requirement That Licensing Standards Be Nondiscretionary Is Not Applicable.

Finally, there is some question whether the requirement that standards in a licensing regulation be nondiscretionary even applies to the Park District's ordinance. Local governments enforce many licensing laws—requiring business licenses, environmental regulation permits, building permits, and liquor licenses, for example—that might affect firms or individuals who are exercising rights protected by the First Amendment. The requirement of nondiscretionary standards obviously has never applied to licensing regulations like these. Rather, the Court has applied that requirement only to permitting schemes that are "directed narrowly and specifically at expression or conduct commonly associated with expression." *City of Lakewood*, 486 U.S at 760. Thus, for example, the Court has imposed this requirement when a government required a license for "distributing * * * literature of any kind" (*Lovell v. Griffin*, 303 U.S. 444, 447 (1938)); for "public worship" (*Kunz v. New York*, 340 U.S. 290, 290-91 & n. 1 (1951)); for any "parade or procession or other public demonstration" (*Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148 (1969)); or for "solicit[ing]" for members for a labor union (*Staub v. City of Baxley*, 355 U.S. 313, 316 n.1 (1958)) or on behalf of a religious cause (*Cantwell v. Connecticut*, 310 U.S. 296, 301-02 (1940)). See also *Schneider v. State*, 308 U.S. 147 (1939). All of these permit schemes were directed specifically at expressive activity.

The Park District ordinance is not directed at expression. It requires a permit before any one may conduct, in the parks, a wide variety of activities that are seldom, if ever, expressive: operating a vehicle; erecting a structure; using electronic equipment of certain kinds; landing a helicopter, balloon, or parachute; conducting a sporting event; riding a horse; or bringing in a non-domestic animal. Code § C. 3. a. (5), (7), (8), (11), (12), (13), (14); J.A. 134-35. Activities that are often expressive, like using amplified sound, or sometimes expressive, like conducing a large public gathering, are regulated only as part of a comprehensive regulatory scheme that is plainly not "directed narrowly and specifically at expression" (*City of Lakewood*, 486 U.S. at 760).

In this way, the Park District ordinance is more like an ordinance requiring, for example, a building permit or a business license. Such ordinances will, of course, sometimes be applied to entities, like media firms, that engage in expressive activities and that will not be able to do so as effectively if they do not get a permit—just as petitioners believed that their expression would be curtailed without a permit to assemble a large group and use sound amplification equipment. Any license requirement presents a risk of abuse when applied to entities engaged in expression. But those risks are dealt with on an as-applied basis, not by requiring

that the criteria for granting permits be spelled out with unusual specificity. The reason is that a regulation requiring a building permit or a business license is directed at a wide range of non-expressive activity. The same is true of the Park District's permit requirement.

The Park District ordinance also lacks other characteristics that have prompted the Court to require specific licensing standards. As we have said, the Park District ordinance is unlike the Dallas licensing ordinance involved in *FW/PBS*, *supra*, because the Dallas ordinance "largely target[ed] businesses purveying sexually explicit speech" (493 U.S. at 224 (plurality opinion)). That is, the ordinance targeted not just expression, but expression with a certain content. The Park District ordinance has neither characteristic.

The Park District ordinance is unlike the licensing ordinances invalidated in *City of Lakewood, supra*, and *Riley v. National Federation of the Blind*, 487 U.S. 781, 801-02 (1988), on which petitioners rely (*e.g.*, Pet. Br. 22) in at least two respects: the Park District ordinance does not target expression, and it does not require an individual "periodically [to] renew a license" (*City of Lakewood*, 486 U.S. at 759; see *Riley*, 487 U.S. at 801). The Court has emphasized that when a government agency requires "multiple or periodic licensing" (*City of Lakewood*, 486 U.S. at 759) it gives itself greater power to retaliate against speech it dislikes. *Id.* at 759-60; see *Riley*, 487 U.S. at 801. Individuals may choose to seek permits from the Park District on more than one occasion, but the Park District has not required renewals, and therefore has not put itself in the position that led the Court to require specific standards.

For all of these reasons, it is questionable whether the requirement that specific standards govern the issuance of a license should even be applicable to the Park District ordinance. Whatever the Court's conclusion on that point,

however, there is certainly no reason to apply that requirement with special rigor in a setting that presents such a limited threat to free expression. The Park District's standards—which go as far in the direction of specificity as anyone could reasonably require—are plainly enough to defeat petitioners' claim that the ordinance is unconstitutional on its face.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

From Chicago Park District Code, Chapter VII, Section C. 5.:

e. Contents of Notice: Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application for permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place.

To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

(1) the application for permit (including any required attachments and submissions) is not fully completed and executed;

(2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification

agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;

(3) the application for permit contains a material falsehood or misrepresentation;

(4) the applicant is legally incompetent to contract or to sue and be sued;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part thereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District

concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent.